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# Politics and Constitutional Jurisgenesis: A Cautionary Note on Political Constitutionalism

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<Abstract>

*This paper aims to provide an alternative account of political constitutionalism by situating it in a broader process of constitutional politics than the traditional court vs parliament debate has suggested. Drawing upon Robert Cover's distinction between the jurispatic and the jurisgenerative constitution, I argue that parliamentary decision-making is not necessarily more congenial to a jurisgenerative constitutional order than judicial review as political constitutionalists contend. I trace the jurispatic character of current scholarship on political constitutionalism to the presupposition of institutional sovereignty in a narrow understanding of constitutional politics, which its defenders share in common with the supporters of judicial supremacy. To move towards a robust version of non-court-centred jurisgenerative constitutionalism, which I call constitutional jurisgenesis, we need to rethink the place of politics in a constitutional order. From Cover's idea of constitutional nomos I take two further lessons for this new understanding of constitutional politics. First, constitutional theory should reconsider the role of institutional sovereignty in the relationship between law and politics in constitutional orders. Second, to engage the people in constitutional politics, we need to shift attention from the popular sovereignty-centred debate to constitutional narratives, which are oriented towards nomos-building.*

**[Keywords]** narratives and *nomos*, Robert Cover, legal constitutionalism, political constitutionalism, constitutional jurisgenesis, institutional sovereignty, popular sovereignty, jurisgenerative constitution, judicial supremacy vs parliamentary sovereignty, constitutional jurispathy

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## I. INTRODUCTION

Despite its roots in the British constitutional context, the debate between political and legal constitutionalism has found expression beyond the British Isles and other Westminster democracies.<sup>1</sup> One prominent feature of the recent developments in the global constitutional landscape is the adoption of some form of judicial/ constitutional review in more and more jurisdictions, regardless of political traditions.<sup>2</sup> As judicial review has long been taken as a

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<sup>1</sup> Compare A Tomkins, ‘What’s Left of the Political Constitution?’ (2013) 14 *German Law Journal* 2275, 2275-76, with M Tushnet, ‘The Relationship Between Political Constitutionalism and Weak-Form Judicial Review’ (2013) 14 *German Law Journal* 2249.

<sup>2</sup> For the introduction of judicial review into the Commonwealth countries, see S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory And Practice* (Cambridge University Press, Cambridge, 2013). For the spread of judicial review to new constitutional democracies, see e.g., T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003); W Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, Dordrecht, 2005). As my focus is on the (quasi-)judicial review of the constitutionality of legislation by the national legislature (or its compatibility with a super-statute-like bill of rights as appropriate), I

core institutional feature of constitutional democracy,<sup>3</sup> the judicial enforceability of a constitution appears to be the defining feature of constitutionalism, suggesting the dominance of legal constitutionalism in the new global constitutional landscape.<sup>4</sup> Echoing the British debate surrounding the Human Rights Act 1998 (HRA), however, this legalist understanding raises some fundamental issues about constitutional order. Among them is the judicial intervention in democratic politics, stopping the political community from resolving fundamental issues through further deliberation and other democratic means.<sup>5</sup> Settling disputes through judicial decisions instead of democratic political processes seems to give the judiciary the final say over the interpretation of the constitution. To legal constitutionalism is attributed the withering of constitutional meaning. Judicial review curtails the development of constitutionalism. So goes political constitutionalism.<sup>6</sup>

Seen in this light, the seemingly unending debate between political and legal constitutionalists centres on the role of courts vis-à-vis the political branches in decision-making in constitutional orders. I find this court-centred debate unduly limited. To throw light on the broad implications of the political vs legal constitutionalism debate to the global constitutional landscape, I shall provide an alternative account of political constitutionalism in this paper by drawing upon the distinction between the jurispathic and the jurisgenerative

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use judicial and constitutional review interchangeably unless otherwise specified. For the concept of super-statute, see WN Eskridge, Jr and J Ferejohn, 'Super-Statutes' (2001) 50 *Duke Law Journal* 1215.

<sup>3</sup> KE Whittington, 'An "Indispensable Feature"? Constitutionalism and Judicial Review' (2002) 6 *New York University Journal of Legislation & Public Policy* 21, 22.

<sup>4</sup> Tushnet (n 1).

<sup>5</sup> J Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 1999) 8-10.

<sup>6</sup> R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2013) 147-54.

constitution that Robert Cover made famous.<sup>7</sup> *Pace* the intuition of political constitutionalists, I shall argue, the parliamentary (or legislative) process is not necessarily more congenial to constitutional politics than judicial review. Departing legal constitutionalism, constitutional orders still face the contestation between jurisgenerative and jurispathetic politics. Notably, the idea of ‘jurisgenerative politics’ has been picked up and further elaborated by scholars engaged in the debate over the relationship between democracy and the rule of law following the ‘republican revival’ such as Frank Michelman, Jürgen Habermas, and Seyla Benhabib.<sup>8</sup> As I shall show, jurisgenerative politics, as Cover envisaged it, is far more than a procedural approach to democracy as those scholars have suggested. Only when citizens engage in the contentious debate over public issues and thereby play a role in engendering the meaning of the political community not only in procedural but also in substantive terms should (and can) politics be considered jurisgenerative.<sup>9</sup> This is why Cover’s ‘original’ version of jurisgenerative politics that rests on the dialectic of narratives and counternarratives deserves a close read, which I aim to provide in this paper. Learning lessons from Cover, political constitutionalists should shift focus from the institutional relationship between the court and the legislature to the way that

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<sup>7</sup> RM Cover, ‘The Supreme Court, 1982 Term -- Foreword: *Nomos* and Narrative’ (1983) 97 *Harvard Law Review* 4.

<sup>8</sup> F Michelman, ‘Law’s Republic’ (1988) *Yale Law Journal* 1493; J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg, MIT Press, Cambridge, MA, 1996); S Benhabib, *Another Cosmopolitanism* (ed R Post, Oxford University Press, Oxford, 2006). See also S B Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (Columbia University Press, New York, NY, 1986). Robert Post discusses whether civic republicanism would have changed Cover’s radical view on jurisgenerative politics had ‘*Nomos* and Narrative’ not been published prior to the republican revival. RC Post, ‘Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in *Nomos* and Narrative’ (2005) 17 *Yale Journal of Law & the Humanities* 9, 14-15.

<sup>9</sup> Cf WF Harris II, *The Interpretable Constitution* (Johns Hopkins University Press, Baltimore, 1993).

they can become constituents of broader constitutional politics.

To get to the heart of Cover's radical view of jurisgenerative politics, the role of narratives in his constitutional imagination needs to be brought to the fore in the first place. As will be further discussed, storytelling is essential to narratives, which help to integrate seemingly isolated historical fragments into a meaningful whole. For this reason, narratives are usually associated with strategic (re)constructions of social reality.<sup>10</sup> In line with such constructivist position, Michael Ryan observes, Cover understood narratives 'as [parts of] an ongoing story whose ending is less determined by what has already been conceived than by choices made regarding what has yet to be imagined'.<sup>11</sup> As I shall show, it is through the interaction between 'what has already been conceived' and 'what has yet to be imagined' that narratives are pivotal to a jurisgenerative constitutional politics.

To drive my point home, I shall first reconceive the relationship between law and politics, which lies at the heart of the political vs legal constitutionalism debate,<sup>12</sup> in light of Cover's observation of the exponential multiplication of constitutional meaning in 'Nomos and Narrative'.<sup>13</sup> Under this view, neither the court nor the parliament is inherently

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<sup>10</sup> J Bruner, 'The Narrative Construction of Reality' (1991) 18 *Critical Inquiry* 1. See also M Hyvärinen, 'Analyzing Narratives and Story-Telling' in P Alasuutari et al (eds), *The SAGE Handbook of Social Research Methods* (SAGE, London, 2008) 447. Notably, narratives play an increasing role in the constructivist school in theories of international relations. See B Bliesemann de Guevara (ed), *Myth and Narrative in International Politics: Interpretive Approaches to the Study of IR* (Palgrave Macmillan, London, 2016). See also T Flockhart, 'Towards a Strong NATO Narrative: From a "Practice of Talking" to a "Practice of Doing"' (2012) 49 *International Politics* 78; V d Salla, 'Political Myth, Mythology and the European Union' (2010) 48 *Journal of Common Market Studies* 1. For example, 'strategic narratives' have been proposed as a way to shape the structure and politics of the international order. See generally A Miskimmon et al (eds), *Forging the World: Strategic Narratives and International Relations* (University of Michigan Press, Ann Arbor, MI, 2017).

<sup>11</sup> M Ryan, 'Meaning and Altnernity' in M Minow et al (eds), *Narrative, Violence and the Law: The Essays of Robert Cover* (University of Michigan Press, Ann Arbor, MI, 1995) 267, 271.

<sup>12</sup> G Gee and GCN Webber, 'A Grammar of Public Law' (2013) 12 *German Law Journal* 2137, 2137.

<sup>13</sup> Cover (n 7).

jurisgenerative given their official role in a constitutional order. With the inbuilt jurispathic character of both legal and political constitutionalism revealed, I shall continue to explore what we can learn from Cover with an eye to an alternative robust version of non-court-centred, political constitutionalism, which I call constitutional jurisgenesis. I suggest that two lessons can be taken from Cover. At the macro-level, constitutional politics must be reconceived without assuming an institutional sovereign, whether its holder is the court or the parliament;<sup>14</sup> at the micro-level, to engage the people in constitutional politics, we need to rethink how a constitution relates itself to the people by shifting attention from the debate surrounding popular sovereignty to constitutional narratives oriented towards *nomos*-building.

## **II. CONSTITUTIONALISM AT THE CROSSROADS: LAW, POLITICS, AND CONSTITUTIONAL JURISGENESIS**

To rethink the relationship between law and politics at the heart of constitutionalism, I first provide a close read of Cover's '*Nomos and Narrative*' to disclose the distinction he made between the jurispathic and jurisgenerative constitution. Following the discussion of why legal constitutionalism is regarded as jurispathic through the lens of '*Nomos and Narrative*', I focus on the role of constitutional politics in *nomos*-building and further assess the relationship between political constitutionalism and constitutional jurisgenesis.

### ***A. Cover Uncovered: Discovering the Jurispathic Nature of Legal Constitutionalism***

Interpretation occupies the central place in law, aimed at discovering the meaning of the

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<sup>14</sup> I shall elaborate on the idea of institutional sovereignty under the heading 'Lesson One: Dethrone Institutional Sovereigns'.

law in a concrete context.<sup>15</sup> Yet, in ‘*Nomos and Narrative*’, Cover suggested that the relationship between interpretation and meaning be reconceived in line with a new understanding of law. To Cover, the law envisages a whole world, a normative synthesis that includes ‘legal precepts’ and ‘narratives’, which Cover called a ‘*nomos*’.<sup>16</sup> To understand the legal institutions or prescriptions, we need to relate them to ‘the narratives that locate [them] and give [them] meaning’.<sup>17</sup> Situated in this discursive context, the legal precepts are no longer the commands of authorities but have their ‘history and destiny, beginning and end’.<sup>18</sup> Thus, the enterprise to discover the meaning of the law goes beyond the application of the methods of legal interpretation.<sup>19</sup> Given that the social reality in which legal interpretation is embedded results from our imagination, history, literature, and other narratives also find their way into the *nomos* and its interpretation.<sup>20</sup> In sum, as the *nomos* comprises both legal rules and principles and their meaning-embedding narratives, to discover the meaning of law is more the understanding of the entire legal order than the interpretation of legal precepts.<sup>21</sup>

Yet the foregoing duality of a *nomos* points to the ‘tension between reality and vision’ in law resulting from ‘the act of creative narrative’.<sup>22</sup> Also, Cover noted that narratives play the intermediary role in the formation of a *nomos* by ‘relat[ing] our normative system to our social

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<sup>15</sup> Compare R Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge, MA, 1985) 146-66, with JB White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press, Chicago, 1990) 239-41, 244-46. See also Harris (n 9) 2-7.

<sup>16</sup> Cover (n 7) 4. Cover suggested that legal precepts include rules, principles, and other prescriptive norms on procedure, substance, and institution. Ibid 7-8.

<sup>17</sup> Ibid 4.

<sup>18</sup> Ibid 5.

<sup>19</sup> Compare P Bobbitt, *Constitutional Interpretation* (Blackwell, Cambridge, 1991) 9-30, with Harris (n 9) 114-63.

<sup>20</sup> Cover (n 7) 5.

<sup>21</sup> See M Minow, ‘Interpreting Rights: An Essay for Robert Cover’ (1987) *Yale Law Journal* 1860, 1861-62.

<sup>22</sup> See Cover (n 7) 9.



constructions of reality and to our visions of what the world might be'.<sup>23</sup> Departing the distinction between 'is' and 'ought' embedded in varieties of legal theory, Cover thus argued that '[t]o live in a legal world requires that one integrate the "is", the "ought", and the "what might be"'.<sup>24</sup> It is narratives that integrate these domains.

To see the integrative role of narratives in building a *nomos* more clearly, a closer look at the relationship between interpretation and the meaning in law in Cover's theory will help. Building on the idea of commitment, Cover located '[t]he transformation of interpretation into legal meaning' in the moment 'when someone accepts the demands of interpretation and, *through the personal act of commitment*, affirms the position taken'.<sup>25</sup> This is more than consent to or acceptance of a particular rendering of the legal text. Rather, '[s]uch affirmation entails a [unique] commitment to projecting the understanding of the norm at work in our reality through all possible worlds unto the teleological vision that the interpretation implies'.<sup>26</sup> Seen in this light, the creation of legal meaning also requires 'the objectification of that to which one is committed' as the legal interpretation rendered and its meaning become that which those inhabiting the political community will live by.<sup>27</sup> To engender the objectification of the norms to which one is committed requires 'a story of how law...came to be, and more importantly, how it came to be one's own', i.e., a narrative in which other members of the community can also find themselves.<sup>28</sup> This commitment-underpinned interpretation reflects

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<sup>23</sup> See *ibid* 10.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* 45 (emphasis added).

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*.

<sup>28</sup> *ibid*.

Cover's radical view of 'law in action',<sup>29</sup> setting his conception of law as a normative world in which the law-interpreters also live the law they recreate in their own interpretation apart from those grounded only in legal analysis or moral philosophy.<sup>30</sup>

Cover's prototype of law as a *nomos* and how narratives mediate the tension between reality and vision is the norms of insular 'paideic' communities in which '[d]iscourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic'.<sup>31</sup> To put it in another way, in such close-knit communities, discourses and behaviours are intertwined so much so that the members effectively live out what the community law prescribes while remaking it through their discourses and behaviours.<sup>32</sup> Notably, the juisrsgenerative process in Cover's ideal 'nomian' communities is characterized by its radical instability.<sup>33</sup> More important, a nomian community may attempt to remake the whole world on the model of its own *nomos*. This is what Cover called 'redemptive constitutionalism'.<sup>34</sup> I hasten to add that Cover did not suggest that constitutional redemption would rely on insular communities turning redemptionist. Instead, Cover was concerned about the realization of redemptive constitutionalism in the conflicted world of legal pluralism.<sup>35</sup> With 'the fecundity

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<sup>29</sup> Aviam Soifer, 'Covered Bridges' (2005) 17 *Yale Journal of Law and the Humanities* 55, 62-63.

<sup>30</sup> J Resnik, 'Living Their Legal Communities: Paideic Communities, Courts, and Robert Cover' (2005) 17 *Yale Journal of Law and the Humanities* 17, 27-29. Cf P Brooks, 'Narrative Transactions—Does Law Need a Narratology?' (2006) 18 *Yale Journal of Law & the Humanities* 1. For a critique of Cover's legal theory from the perspective of analytical philosophy, see T Brooks, 'Let a Thousand Nomoi Bloom? Four Problems with Robert Cover's *Nomos and Narrative*' [2006] *Issus in Legal Scholarship* (Article 5).

<sup>31</sup> Cover (n 7) 13.

<sup>32</sup> See Post (n 8) 10; Resnik (n 30) 27-28.

<sup>33</sup> See Cover (n 7) 12-35. Cover noted that paideic communities tend to be insular as they maintain their legal meaning by expelling the destabilizers of the normative order. Ibid 15-16. Robert Post argues that all *nomoi* are jurispathic for the exclusionary character of paideic communities. Post (n 8) 13-14.

<sup>34</sup> Cover (n 7) 33.

<sup>35</sup> See ibid 13. See also PS Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, Cambridge, 2012) 306-07.

of the jurisgenerative principle' prompting 'the need to maintain a sense of legal meaning' and no *nomos* prevailing over another due to 'the absence of a single, objective interpretation', Cover noted, the agency of the state law (including the court) often claims to secure legal meaning '[b]y exercising its superior brute force'.<sup>36</sup> To be clear, this does not mean that the modern legal world sustains itself only by force. Instead, Cover observed that the state appeals to certain 'virtues' and some 'mode of world maintenance' in response to 'the problem of the multiplicity of meaning' in our modern legal world.<sup>37</sup> Yet the virtues and the mode of world maintenance that are put forward in the judicial discourse to sustain our modern legal world are inclined towards objectivity and universalism. Cover contended that appealing to this 'imperial' pattern of *nomos* formation, the state law ceases to be a self-reflexive 'world-creating' project but instead turns into a 'world-maintaining' instrument.<sup>38</sup> This is the underlying cause of the jurispathy of the state law.<sup>39</sup>

Contemplating the way out of the legal jurispathy of the modern state, Cover turned to commitment again. Facing the jurispathic state legal order, Cover suggested, citizens have two options. Either they resign themselves to the state or they act to remake the existing constitutional order on the model of their ideal *nomos*.<sup>40</sup> To live by one's own law means opting for the second path, taking the course of redemption. To make it into a jurisgenesis,

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<sup>36</sup> See Cover (n 7) 40-44.

<sup>37</sup> Ibid 16.

<sup>38</sup> Ibid 12-13.

<sup>39</sup> Post (n 8) 11-13.

<sup>40</sup> To change the existing legal order requires a 'movement of law', which Cover considered to be redemptive and distinguished from a simple movement of protest. To explain this distinction, Cover revisited the antebellum debate between Garrisonians and Frederick Douglass about the relationship between the US constitution and slavery. See Cover (n 7) 35-39. For the present purposes, I leave out the possibility of living with the state by simple protest.

Cover pointed out, the redemptionists have to develop a ‘text of resistance’ through which the injustice they have suffered under the existing legal order and the new constitutional *nomos* they aspire to can be related to their fellow citizens.<sup>41</sup> As part of the redemptive movement to change the existing legal order into a particular *nomos*, the text of resistance needs to be expressed and further interpreted in a way that can persuade other citizens, including through the redemptionists’ sufferings, if necessary. Otherwise, the aspired constitutional order would be tantamount to another system of juridical violence.<sup>42</sup> Thus, it is civil disobedience, not democratic deliberation, that Cover turned to for the exemplary jurisgenerative act.<sup>43</sup> To Cover, obligation and responsibility rather than rights occupy centre stage in *nomos*-building<sup>44</sup> and commitment is the key to the success of the ‘secondary hermeneutic’ of the *nomos*-building narratives, ie, the text of resistance, when the redemptionists struggle not only with the state law but also among themselves in the face of legal pluralism.<sup>45</sup>

Yet, Cover did not hold high hopes for official redemption through commitment in the bureaucratic administration of the inherently violent state legal order.<sup>46</sup> Take the judge, the preeminent interpreter of the state law. Interpreting the law or adjudicating a case, ‘the judge – armed with no inherently superior interpretive insight, no necessarily better law – must

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<sup>41</sup> See *ibid* 49-50.

<sup>42</sup> Cover suggested that not only the state but also communities and movements are the object of legitimization through constitutionalism. See *ibid* 68. On this view, ‘[l]egal meaning becomes a “potential restraint on [any] arbitrary power and violence”’. *Ibid*.

<sup>43</sup> Resnik (n 30) 32-33; see also Post (n 8) 14-15.

<sup>44</sup> Soifer (n 29) 67-68.

<sup>45</sup> See Cover (n 7) 50-53. This point distinguishes Cover’s view from the so-called ‘unsettlement theorists’, who attribute the legitimacy of a constitution to its reflection of the preferred policy positions of individual citizens. See LM Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (Yale University Press, New Haven, CT, 2001).

<sup>46</sup> Compare Post (n 8), with A Sarat, ‘Robert Cover on Law and Violence’ in M Minow et al (eds) (n 11) 255, 260-61.

separate the exercise of [legal] violence from [her] own person' by attributing her decision and the accompanying force to the impartial function of the law.<sup>47</sup> To this end, Cover observed, the judge appeals to what he called 'texts of jurisdiction' to dissociate herself from the violence of the state legal order she is mandated to administer.<sup>48</sup> Yet, more often than not, appealing to jurisdictional rules results in '[judicial] deference to the authoritarian application of violence'.<sup>49</sup>

Even if the judge is personally open to the extra-state constitutional visions, she may well fail to help with the jurisgenerative process of reconstructing constitutional meaning and reimagining the constitutional *nomos*. In the face of the conflicting constitutional visions submitted by distinct civil sectors, the state agency's acceptance of one vision rather than another will not indicate a jurisgenerative substitution of padeic norms for the jurispathic state law. Rather, the court's choice may risk the suggestion that the state is taking sides in the uncertain struggle over constitutional visions among the civil sectors. This explains why the court tends to decline the conflicting invitations from the civil sectors to adopt any of their renderings of constitutional principles and to seek refuge in the seemingly neutral rules of jurisdiction.<sup>50</sup> Yet, escaping from the articulation of constitutional principles to the exegesis of jurisdictional rules, the court also disengages itself from the jurisgenerative process. Taken together, Cover concluded, '[c]ourts...are characteristically "jurispathic"'.<sup>51</sup> In this light, the

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<sup>47</sup> Cover (n 7) 54.

<sup>48</sup> Notably, Cover included not only the technical rules governing the jurisdiction of courts but also the general legal grounds of the judicial power in the texts of jurisdiction. See *ibid*.

<sup>49</sup> *Ibid* 56.

<sup>50</sup> Resnik (n 30) 34. Cover discussed the tendency towards a positivist invocation of the text of jurisdiction to avoid the risky natural law alternative. See Cover (n 7) 58-60.

<sup>51</sup> *Ibid* 40.

legal world centring on judicial review as legal constitutionalism envisages is far from a *nomos* but instead a juridical order of institutionalized force devoid of meaning.

### ***B. Constitutional Politics and Nomos-Building: A Jurisgenerative Case for Political Constitutionalism?***

I noted above that Cover characterized judicial review as jurispathic for either it imposes the violence-backed official rendering of constitutional principles on the political community or it takes itself out of the jurisgenerative process by dodging constitutional issues under the pretext of jurisdictional rules. Given the growing influence of the constitution on everyday politics,<sup>52</sup> Cover's scepticism about judicial review seems to echo the plea for 'political constitution' made by John Griffith: 'political questions of much day-to-day significance' should not be 'left to decision by the judiciary'.<sup>53</sup>

Political constitutionalism and Cover's ideal legal world as a *nomos* converge on a crucial point: both emphasize the role of the extrajudicial processes in the functioning of constitutional orders. To Cover, judicial review stops the continuing jurisgenerative process in which members of a political community find their place in the (re)generation of the meaning of the constitution; to political constitutionalists, the court simply 'fobs off' attempts to resolve significant political issues through deliberation in democratic societies.<sup>54</sup> Moreover, questioning the final say the court claims to have over constitutional issues, both take conflict as the key to understanding the meaning of the constitution. Cover attributed the tragic

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<sup>52</sup> See M-S Kuo, 'Reconciling Constitutionalism with Power: Towards a Constitutional *Nomos* of Political Ordering' (2010) 23 *Ratio Juris* 390, 391-94.

<sup>53</sup> JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 14.

<sup>54</sup> See *ibid.*

jurispathic character of judicial review to conflicting visions in pluralist societies and pinned hopes for constitutional jurisgenesis on narratives that originate in norm contestation beyond the judicial process; political constitutionalists entrust political institutions, the parliament in particular, with the resolution of fundamental conflicts in the face of value pluralism.<sup>55</sup>

Beyond their shared scepticism about judicial review, however, there is a key difference. To Cover, it is ‘extrastate jurisgenesis’ that generates and rejuvenates the meaning of the constitution;<sup>56</sup> to political constitutionalists, what matters is the arguments and reform attempts that are proposed, debated, negotiated, and decided by political institutions. To put it bluntly, Cover focused on the making of constitutional narratives that would bring about commitment in interpretation, whereas political constitutionalism suggests the pivotal role of the political institutions vis-à-vis the court in giving meaning to the constitution. Cover’s deep scepticism about the jurispathic court is part of his fundamental distrust of the state power.<sup>57</sup> If my characterization is correct, through Cover’s lens, political constitutionalism seems to be no less jurispathic than legal constitutionalism as it still ties the meaning of the constitution to its official rendering. This raises a fundamental question to political constitutionalists: If at the heart of constitutionalism is not just the question of which institution (or department) of constitutional power should have the final say, what is it that really distinguishes political from legal constitutionalism? Cover’s reflections upon how the court could be made less jurispathic provide some hints about the answer.

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<sup>55</sup> See *ibid* 18-20.

<sup>56</sup> Cover (n 7) 53.

<sup>57</sup> Post (n 8).

Acknowledging the jurispathic character of the court, Cover still entertained hopes for the state law being interpreted in a way conducive, at least partially, to jurisgenesis.<sup>58</sup> Rejecting the legal positivism that has guided the technical invocation of the text of jurisdiction, Cover urged the judge to embrace what he called a ‘natural law of jurisdiction’.<sup>59</sup> As discussed above, Cover understood the text of jurisdiction in a broader sense.<sup>60</sup> From this broader view of jurisdiction, Cover pinned hopes for a possible judicial redemption on a nonpositivist engagement with the general grounds of the judicial power when the judge interprets the law.<sup>61</sup> The judge is not personally innocent when she is faced with a conflict between the state law and the non-state norms. Instead, she can only commit herself to the law she is interpreting by disclosing its violent nature.<sup>62</sup> Thus, the judge is expected to elaborate on ‘the institutional privilege of force’ trusted with her when she faces a conflict between the state and the civil visions of constitutional principles.<sup>63</sup> Unlike the positivist and technical employment of jurisdictional rules, Cover argued, dwelling on the structure of the jurisdiction in this situation is not aimed at conveniently disengaging the judge from the jurisgenerative process. Nor is it an instance of deference to the political departments.<sup>64</sup> Rather, it opens the judicial exercise of state violence to the process of justification and shows

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<sup>58</sup> Resnik (n 30) 33-35; Sarat (n 46) 261. But see Post (n 8). Cover was drawn to an even more pessimistic stance on judicial interpretation in his later work. See RM Cover, ‘Violence and the Word’ (1986) 95 *Yale Law Journal* 1601; RM Cover, ‘The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role’ (1986) 20 *Georgia Law Review* 815.

<sup>59</sup> Cover (n 7) 58.

<sup>60</sup> See n 48.

<sup>61</sup> Notably, Cover’s hope for such redemption was not high in terms of the bureaucratic/ managerial propensity of judges: ‘[judges] are [accustomed] to casting their cautious eyes about, ferreting out jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege’. Cover (n 7) 67.

<sup>62</sup> Resnik (n 8) 34-35; Sarat (n 44) 261.

<sup>63</sup> See Cover (n 7) 54.

<sup>64</sup> See *ibid* 56-57.



the judge's personal commitment in the act of interpretation. The judge's judgment cannot hide behind the threat of state violence but has to base itself on the narratives underpinning the legitimacy of judicial power. The objective of a nonpositivist rendering of the text of jurisdiction is to ground the court's authority in the judge's bringing forth the constitutional vision and its underlying principles. To Cover, '[i]n a truly violent, authoritarian situation, nothing is more revolutionary than the insistence of a judge that [she] exercise such a 'jurisdiction' – but only if that jurisdiction implies the articulation of legal principle according to an independent hermeneutic'.<sup>65</sup> Under this natural law of jurisdiction, 'the employment of [legal] force is not revealed as a naked jurispathic act'.<sup>66</sup> Instead, the 'texts of jurisdiction' become the judge's 'apologies for the state [violence] itself'.<sup>67</sup> At the end of the day, '[t]he commitment to a jurisgenerative process that does not defer to the violence of administration is the judge's only hope of *partially* extricating [herself] from the violence of the state'.<sup>68</sup>

Cover's subtle critique of the US Supreme Court's implicit repudiation of the racist disciplinary rules of Bob Jones University illustrates how narratives can render judicial decisions less jurispathic and, moreover, what a non-court-centred, political version of constitutionalism is really about. In *Bob Jones University v United States*,<sup>69</sup> the Supreme Court (hereinafter the Court) upheld a US Internal Revenue Service (IRS) ruling that denied a non-denominational Protestant Bob Jones University the tax-exempt status that had been granted to certain charitable religious and educational institutions (including Bob Jones

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<sup>65</sup> Ibid 59.

<sup>66</sup> Ibid 54.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid 59 (emphasis added).

<sup>69</sup> 461 US 574 (1983).

University) for its ban on interracial dating and marriage among its students. The constitutional claim of religious freedom and autonomy made by the appellant and supported by several religious groups as *amici curiae* failed to persuade the Court to rescind the IRS official rendering of the federal tax regulation concerned.<sup>70</sup> The Court ruled the IRS' reinterpretation of the tax law as a lawful exercise of administrative discretion in the pursuit of the compelling government interest in eradicating racial discrimination. This seems to be a straightforward case: Religious freedom bowed to racial equality.

That would be true if the focus was only on the outcome: The Court contributed to the further desegregation of American society by affirming the message sent by the IRS ruling to the effect that a racist institution should find no place in the US constitutional order, including the tax-exempt status in the tax code.<sup>71</sup> This deserved a resounding applause. Yet the basis on which the judgement rested, administrative discretion, troubled Cover. What Cover observed of the decision was that in the Court's eye, the eradication of racial discrimination was merely a function of government discretion instead of constitutional commitment. The Court seemed to suggest that under the constitution, the IRS was not obliged to replace the old interpretation that had granted the appellant the tax-exempt status with the impugned new ruling. To Cover, the Court's emphasis on administrative policy and government interest without paying equal heed to religious freedom concerns was nothing short of a naked invocation of imperial virtues, rendering *Bob Jones University* utterly jurispathic. The

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<sup>70</sup> See O Johnson, 'The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence' in WN Eskridge et al (eds), *Statutory Interpretation Stories* (Foundation Press, New York, NY, 2010) 126.

<sup>71</sup> See *ibid.*

Court's failure to situate the decision in the redemptive narrative of America as a nation struggling to rid herself of slavery and racial discrimination indicated the Court's lack of commitment to the *nomos* of equal protection. As a result, eradicating racial discrimination was reduced to one of the many government interests with its constitutional meaning being left out. Moreover, disconnecting the issue from the value conflict between equal protection and religious freedom, the Court gave short shrift to the *nomoi* of distinct *amici curiae* that had reflected a long history of fighting against the political persecution of religious groups.<sup>72</sup> Religious freedom was thus not sacrificed for the equally important redemption of the constitutional promise of equal protection but was rather easily set aside in the pursuit of a compelling government interest.

What is of significance in Cover's critique of *Bob Jones University* is not how the court can make its judgment less jurispathic in individual cases but his envisaged jurisgenerative constitutional politics, which is oriented towards *nomos*-building. Specifically, the court, through its judgment and the underlying reasoning, also contributes to the constantly rejuvenated, broader constitutional narratives that give meaning to the constitution. The judicial decision may affirm, rewrite, or take forward the continuing constitutional narratives, which have shaped up in the broader constitutional politics of conflicting constitutional principles involving the administration, the legislature, the religious groups, the trade unions, and all citizens. This narrative-shaping politics is the underpinning of constitutional jurisgenesis. Situated in this jurisgenerative process of norm contestation, the exercise of

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<sup>72</sup> See Cover (n 7) 66-67. Judith Resnik disagrees with Cover and argues that *Bob Jones University* is not jurispathic for its failure to recognize religious freedom. Resnik (n 30) 40-43.

judicial power can be made less jurispahic.

Thus, the way to (partial) redemption for an inherently juristpahic agency of the state lies in the recognition of its non-privileged status in the jurisgenerative process of redefining the constitution. Seen in this light, the court is no more than an impactful player in constitutional politics. So is the parliament. The parliament would be even more jurispahic than the court in the eyes of the public if it is seen to be indifferent to the jurisgenerative process. In other words, a robust version of non-court-centred constitutionalism needs to be situated in a new understanding of constitutional politics, which political constitutionalists have failed to conceive.

### **III. REALIGNING POLITICS WITH CONSTITUTIONAL JURISGENESIS: LESSONS FROM ‘*NOMOS* AND NARRATIVE’**

With the focus shifting from the question of which constitutional power is a more suitable decision-maker to the role of constitutional politics in the alternative robust non-court-centred version of political constitutionalism, reconceiving the place of politics in the constitutional order is necessary to make the constitutional order itself jurisgenerative. For this we have a lot to learn from ‘*Nomos and Narrative*’. Yet some issues about Cover’s stance should be addressed in the first place. Cover’s theory was built around the cases concerning fundamental rights as he was most concerned about the conflict between the state and the civil sectors. It seems that Cover would not have much to say about what a constitutional order should look like when the concern moves beyond the relationship between the government and individuals. Besides, Cover’s jurisgenerative view of the constitution was set against the US constitutional background of popular sovereignty and drew heavily on Jewish sources, giving little hint as to the generation of the *nomos*-underlying narratives. It is not clear whether

Cover's theory could shed new light on the broader issues surrounding a robust version of non-court-centred political constitutionalism in modern democracies. Moreover, Cover's idea of jurisgenerative politics seems to place him in the camp of contemporary deliberative democracy theorists, contradicting his emphasis on the role of narratives in building a *nomos*.

These are all fair questions and I am not sure of how Cover would have replied. Still, in my view, Cover could offer insight on the issues beyond his immediate concern, especially current understanding of jurisgenerative politics. At the heart of Cover's concern is the jurispathic nature of the state legal system and the violence it falls back on. True, the relationship between the government and individuals directly implicates the exercise of the state power. Yet beneath the surface of the constitutional issues concerning fundamental rights lies the question of whether these issues should be resolved through the political process or by adjudication.<sup>73</sup> To answer this question needs to consider how the constitution conceives the relationship between the political departments (especially the legislature) and the court. Moreover, the issues as to how the government is organized and constitutional powers are allocated have a great bearing on the operation of the legal order under which the people live.<sup>74</sup> Thus, in my view, Cover would not object that his theory not only concerns the government vs individuals issues but also bears on the relationship between the political departments and the court and their roles in constitutional politics.

With respect to Cover's theoretical roots in the US experience, what matters is that the

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<sup>73</sup> See Waldron (n 5) 211-312; Bellamy (n 6) 15-51; CR Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, Cambridge, MA, 1999) 24-60.

<sup>74</sup> See C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, Oxford, 2013) 51-109.

idea of democracy has travelled beyond American soil and emerged as the rallying call for political movements of various causes, regardless of whether popular sovereignty intimates another American exceptionalism.<sup>75</sup> I think that Cover would agree that given constitutional democracy's embattled condition in the face of populist challenges,<sup>76</sup> it is more important than ever to look into the politics of constitutional narratives by means of which the constitutional order can be constantly reimagined and thus reconnected to the people.<sup>77</sup>

As noted in Introduction, Cover's aspired *nomos* and jurisgenesis seem to correspond to the idea of jurisgenerative politics around which theorists of deliberative democracy such as Michelman, Habermas, and Benhabib have rallied. Drawing upon Hannah Arendt's attribution of power to plurality and natality, all the three theorists try to answer the question of how the law is (re)generated through the interaction between citizens.<sup>78</sup> To that extent, they share Cover's scepticism about the official rendering of legal precepts in the hands of the state apparatus. Yet, Cover held much deeper distrust of the state than those who approach this issue from the perspective of deliberative democracy.<sup>79</sup> To them, dialogue through inclusive procedures is central to jurisgenerative politics, indicating their predilection for proceduralism. Moreover, jurisgenerative politics can be institutionalized and channelled

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<sup>75</sup> See PW Kahn, 'American Exceptionalism, Popular Sovereignty, and the Rule of Law' in M Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, Princeton, NJ, 2005) 198.

<sup>76</sup> J-W Müller, *What Is Populism?* (University of Pennsylvania Press, Philadelphia, PA, 2016).

<sup>77</sup> A recent discussion of Cover's idea of narratives in constitutional interpretation beyond the US constitutional context can be found in A v Arnauld, 'Norms and Narrative' (2017) 18 *German Law Journal* 309.

<sup>78</sup> Michelman (n 8) 1526-32; Habermas (n 8) 146-68, 267-74, 296-302; Benhabib (1986) (n 8) 309-16, 348-49; Benhabib (2006) (n 8) 48-50.

<sup>79</sup> See H Baxter, 'Habermas's Discourse Theory of Law and Democracy' (2002) 50 *Buffalo Law Review* 202, 266-72; AK Means, 'Intercultural Political Identity: Are We There Yet?' in S Benhabib and J Resnik (eds), *Migrations and Mobilities: Citizenship, Borders, and Gender* (NYU Press, New York, NY, 2009) 380, 386-87, 404.

through the state, especially the court.<sup>80</sup> In contrast to deliberative democrats' public reason-guided understanding, jurisgenerative politics envisaged by Cover is more contentious and even confrontational as the focus is on the substance of the norms in conflict. Jurisgenesis cannot be unencumbered by conflicts of substantive values.<sup>81</sup> Differentiation of the foregoing two versions of jurisgenerative politics is pivotal to understanding the implications of Cover's 'Nomos and Narrative' to constitutional politics and the role of narratives in his envisaged jurisgenerative politics.

Viewed thus, Cover's deep scepticism of the jurispathic character of the state legal order and his passionate aspirations for transforming the constitutional order into a *nomos* through the contestation of competing narratives sets his concept of jurisgenesis apart from the dialogical understanding of jurisgenerative politics, suggesting that the order-changing jurisgenerative process not centre on institutionalized politics but rather originate in the flow of constitutional narratives where an inclusive constitutional politics takes place. In this light, I take two lessons from 'Nomos and Narrative': One is at the macro level; the other at the micro. At the macro level, I take up the role of the idea of institutional sovereignty<sup>82</sup> in the constitutional debate and suggest that constitutional politics be freed of the fetters of institutional sovereignty. Besides, to engage the people in constitutional politics, we need to

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<sup>80</sup> Compare Michelman (n 8) 1528-32, 1535-37; Habermas (n 8) 238-86. See also Post (n 8) 14-15.

<sup>81</sup> Post (n 8) 14-15; Resnik (n 30) 27-34. See also Soifer (n 29) 76-77.

<sup>82</sup> From the perspective of intellectual history, Dieter Grimm notes that the debate surrounding the evolutionary concept of sovereignty has been intertwined with its conceptual bearer and institutional holder. D Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (trans B Cooper, Columbia University Press, New York, 2015) 33-51. In the context of constituent power, Martin Loughlin also critiques attempts to institutionalize sovereignty. M Loughlin, 'The Concept of Constituent Power' (2014) 23 *European Journal of Political Theory* 218, 233-34. See also M-S Kuo, 'Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?' (2013) 26 *Canadian Journal of Law & Jurisprudence* 341, 343.

follow up with rethinking how the constitution relates itself to them. The necessary move from the fiction of popular sovereignty to constitutional narratives oriented towards *nomos*-building lies at the centre of my microscopic take on constitutional politics in light of Cover's jurisgenesis.

### ***A. Lesson One: Dethrone Institutional Sovereigns***

In Introduction, I noted that the continuing spread of judicial review among jurisdictions of different constitutional traditions has reinvigorated the debate about the relationship between law and politics in constitutional theory. Whether judicial review should adopt the 'strong' or the 'weak' form is one of the most featured themes in this debate.<sup>83</sup> In this section, I compare the UK and the US to illustrate how Cover's theory could cast new light on the debate surrounding the judicial power. I choose these two examples for two reasons. First, as far as the role of the judicial power in the constitutional order is concerned, the constitutional debate in both countries tend to be framed as the question of whether politics or law should take the lead in constitutional development. Echoing the political vs legal constitutionalism debate in the UK, the constitutional debate in the US has been in a protracted tug of war between judicial supremacists and constitutional departmentalists.<sup>84</sup> Second, the UK and the US stand in stark contrast in terms of constitutional traditions: the one is noted for its evolutionary character and rooted in parliamentary sovereignty;<sup>85</sup> the other builds on a revolutionary tradition under the watch of a powerful high court.<sup>86</sup> Thus, a comparison of

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<sup>83</sup> See M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, NJ, 2008).

<sup>84</sup> Kuo (n 82) 351-56.

<sup>85</sup> V Bogdanor, *The New British Constitution* (Hart, Oxford, 2009) 11-14.

<sup>86</sup> See B Ackerman, *We the People, Vol. 1: Foundations* (Belknap, Cambridge, MA, 1991) 6-10. I shall



these two examples helps to illustrate the broad implications of Cover's theory to the role of judicial power vis-à-vis the political branch and the role of institutional power in constitutional order in general.

I argue that the debate in the UK and the US has adopted a narrow view of politics underpinned by the idea of institutional sovereignty and has thus centred on the question of whether the parliament or the court should have the final say over constitutional questions. Under this view is a misconceived relationship between law and politics. Learning from Cover, I suggest an alternative understanding of politics in the constitutional order. Denying the formal institutions the sovereign status on constitutional questions<sup>87</sup> and placing them among other players in the broad constitutional politics will pave the way for a meaning-rich constitutional jurisgenesis.

### **1. Parliamentary Sovereignty on Trial: Political Constitutionalism Is Not Necessarily Jurisgenerative**

I have already noted that in light of '*Nomos and Narrative*,' political constitutionalism as portrayed in current scholarship is jurispathic. Now I am taking a closer look at the British constitutional arrangement in which political constitutionalism is situated to see how the relationship between law and politics plays out in it and how the idea of constitutional jurisgenesis can cast new light on that relationship. In the British context, the traditional focus of the relationship between law and politics is on how to effectively hold the executive

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expand further on this juxtaposition when I address the relationship between democracy and the idea of popular sovereignty in the text accompanied by notes 159-67.

<sup>87</sup> For an insightful comparison of the individual-centred and the community-based attitude towards the 'deinstitutionalization of authority', see S Levinson, *Constitutional Faith* (Princeton University Press, Princeton, 1988) 25-26, 44-50.

to account: Does politics or the judicial means provide better antidotes to the abuse of power by the government?<sup>88</sup> Among the many issues deriving from this central concern is the role of the court vis-à-vis the political departments in decision-making. Doctrinally, this issue lies at the heart of whether and, if so, to what extent courts are expected to reconsider the exercise of statutory discretion by the administration under the traditional *Wednesbury*<sup>89</sup> unreasonableness test or the adopted continental proportionality review.<sup>90</sup> While this doctrinal question appears to concern the judicial and executive powers only, it plays out in the shadow of the legislative power as the disputed discretionary power of the executive is delegated by (parliamentary) legislation.<sup>91</sup> Moreover, with the HRA subjecting both administrative acts and parliamentary legislation to judicial scrutiny, this debate is even more heated.<sup>92</sup> Against this backdrop, some political constitutionalists attempt to make a normative case against the trend towards legal constitutionalism in the UK in terms of the role of the parliament and the court in making decisions of constitutional significance.<sup>93</sup>

The core of the case against legal constitutionalism is that the parliamentary process is more suitable to resolve fundamental policy issues than the judicial proceeding in the present pluralist society. Richard Bellamy argues that all theories in support of legal constitutionalism characterised by judicial review are premised on the existence and

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<sup>88</sup> Gee and Webber (n 12) 273.

<sup>89</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223.

<sup>90</sup> Tomkins (n 1) 2283-88.

<sup>91</sup> Councils also hold some legislative powers. See *ibid* 2288. For the present purposes, the legislative power here refers only to those vested in the national legislature.

<sup>92</sup> E.g., A Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, Oxford, 2009); T Hickman, *Public Law after the Human Rights Act* (Hart, Oxford, 2010). Of course, the review of parliamentary legislation by the court is different from that of administrative acts in terms of effect and remedy. HRA, s 4.

<sup>93</sup> E.g., Bellamy (n 6); A Tomkins, *Our Republican Constitution* (Hart, Oxford, 2005). See also Gee and Webber (n 12) 281-90.

discoverability of the correct constitutional answer to current fundamental policy issues.<sup>94</sup> He contends that fundamental policy issues, on which the bill of rights in the constitution has much bearing, are political, not legal, in nature, requiring political solutions.<sup>95</sup> In line with this political version of the constitution, Adam Tomkins further argues that the parliament is better at proportionality (or the *Wednesbury* reasonableness for that matter) reasoning than the court. At the core of the proportionality analysis in judicial decisions is the political consideration and balancing of different constitutional goods. Thus, the parliamentary balancing of competing constitutional goods deserves ‘constitutionally appropriate respect’ from the court.<sup>96</sup> From the perspective of political constitutionalism, the meaning of the constitution materializes through the parliamentary process under the watch of the electorate. And, that is how the constitutional order functions. Thus, a US-style strong-form rights-based judicial review would upend the relationship between the parliament and the court.<sup>97</sup>

Notably, in reaching this conclusion, political constitutionalists make three fundamental assumptions.<sup>98</sup> First, the electorate is the final arbiter of constitutional issues and only the

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<sup>94</sup> See Bellamy (n 6) 91-141.

<sup>95</sup> See *ibid* 3-8.

<sup>96</sup> Tomkins (n 1) 2278.

<sup>97</sup> Political constitutionalists have come to terms with rights-based review, at least in its weak form, for different reasons. For example, Tomkins embraces HRA to prevent the constitutional order from moving further in the direction of legal constitutionalism. He is concerned that rights-based review may become even more exacting with the judge turning to common law constitutionalism if HRA is rescinded. See *ibid* 2281-82. In contrast, Bellamy welcomes HRA for its weak-form judicial review. R Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86.

<sup>98</sup> To reveal the centrality of institutional sovereignty in political constitutionalism (as well as legal constitutionalism), for the present purposes I shall leave aside the political constitutionalist claim that all the supporters of judicial review of parliamentary legislation presume the existence and discoverability of the correct answer to constitutional questions. For a justification of judicial review without this epistemic premise, see FI Michelman, ‘IDA’s Way: Constructing the Respect-Worthy Governmental System’ (2003) 72 *Fordham Law Review* 345.

parliament finds direct connection with the electorate through election.<sup>99</sup> Second, institutionalized politics is privileged over social movements and other forms of citizen mobilization. Attempts to resolve fundamental issues outside the institutional channels of democratic politics are ‘anti-political’.<sup>100</sup> Third, political change is, more often than not, evolutionary: all day-to-day politics has constitutional implications; constitutional politics takes place in the run-of-the-mill political activities. What Bruce Ackerman calls ‘higher lawmaking’ is revolutionaries’ romantic dream not shared by political constitutionalists.<sup>101</sup>

I have no intention to take on these assumptions one by one in the present paper. Rather, I wish to lay bare an ‘infelicity’ implicit in the first assumption, which would cast doubt on the version of political constitutionalism as described above. From the democratic perspective, it is true that the electorate should be the final arbiter of constitutional issues. It is equally true that election is central to the link between the electorate and the parliament.<sup>102</sup> But it is not clear why election has to be the only means for the electorate to have their voice heard in decision-making if the electorate means not only the voters casting their ballots on the election day but also the citizens who are able to take other political actions than voting. For example, citizens can petition their parliamentarians in the interval between elections to decide an issue in a certain way.<sup>103</sup> Moreover, if such petitions are considered one of the legitimate means connecting citizens (or the electorate) to policy decisions, it is hard to see why they cannot

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<sup>99</sup> Bellamy (n 6) 200-01, 239-40.

<sup>100</sup> Ibid 139.

<sup>101</sup> See ibid 29-41. For the idea of higher lawmaking vis-à-vis normal politics, see Ackerman (n 86) 230-314.

<sup>102</sup> Cf B Ackerman and JS Fishkin, *Deliberation Day* (Yale University Press, New Haven, CT, 2004).

<sup>103</sup> Cf Bellamy (n 6) 136.

direct their petitions to other decision-making bodies through other means. Litigation is an example.<sup>104</sup>

Political constitutionalists may counter that petitioning to the parliament is an integral part of electoral democracy, which distinguishes legislative petition from judicial litigation. Even so, it remains unclear why the parliament-centred process of electoral democracy should be granted the status as the privileged channel of politics at the expense of other forms of political action. As social scientists have long documented, wealth, education, ethnicity, race, culture, and other factors bear greatly on participation in electoral democracy, including the constituents' connection to their local parliamentarians.<sup>105</sup> A constitutional theory in which the parliament-centred political process is conceived as pre-empting other channels of political mobilization fails to consider the latter's compensatory role in political participation for the de facto disenfranchised population.<sup>106</sup>

I hasten to add that what I have just stated does not suggest that litigation or other sorts of political participation displace election from the centre of democratic politics. Rather, my point is that election should not be viewed as the exclusive means whereby citizens find

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<sup>104</sup> Although petition and litigation appear to be functionally distinct actions in the modern eye, both were part of the various functions the parliament once attained. See A Tomkins, *Public Law* (Oxford University Press, Oxford, 2003) 90-97. It is also noteworthy that the postbellum experience in the US suggests that with the support structures such as cause lawyering, litigation can be more accessible than vote to the less privileged groups. M Graber, 'Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited' (2004) 21 *Constitutional Commentary* 485, 538.

<sup>105</sup> The Electoral Commission, *Social Exclusion and Political Engagement* (Research Report November 2005, London); JS Davies, 'The Social Exclusion Debate: Strategies, Controversies and Dilemmas' (2006) 26 *Policy Studies* 3. But see Bellamy (n 97) 91-94.

<sup>106</sup> One of the foremost theoretical accounts of the compensatory role of judicial review in this regard is John Ely's representation-reinforcing model of judicial review. JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MA, 1980).

connection to politics to the extent that other forms of political participation are regarded as anti-political. Rather, they jointly put the idea of democracy into action.<sup>107</sup> Thinking further down the line, I doubt that social movement is anti-political as political constitutionalists seems to suggest, especially when it functions as the compensation for institutionalized political decision-making.<sup>108</sup> Coming to terms with the political character of social movement, we then see why some political decisions that are taken during the moments of highly mobilized citizen participation need to be distinguished from those pushed through amid unnoticed political bargains.<sup>109</sup> Or, we can simply ask, should we give equal weight of democracy to all political decisions and allow them to be easily disregarded through political bargains? From the perspective of normative democratic theory, it demands a resounding ‘No’ for the answer.<sup>110</sup>

If so, a hierarchy of legal norms emerges.<sup>111</sup> On the conceptual level, the constitution, which supposedly enjoys general support beyond the simple majority of the citizenry, is to be distinguished from the rest.<sup>112</sup> Normatively the constitution is not subject to the run-of-the-

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<sup>107</sup> P Scott, ‘(Political) Constitutions and (Political) Constitutionalism’ (2013) 14 *German Law Journal* 2157, 2171-72.

<sup>108</sup> E.g., JM Balkin and RB Siegel, ‘Principle, Practices, and Social Movements’ (2006) 154 *University of Pennsylvania Law Review* 927.

<sup>109</sup> See JM Balkin, *Living Originalism* (Belknap, Cambridge, MA, 2011) 10-11. To Jeremy Waldron, however, both are the ordinary workings of representative democracy and thus entitled to equal respect in constitutional terms. Waldron (n 5) 256-57.

<sup>110</sup> See B Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Belknap, Cambridge, MA, 2014) 311-14. See also AA i Ninet and JM Molas, ‘Habermas and Ackerman: A Synthesis Applied to the Legitimation and Codification of Legal Norms’ (2009) 22 *Ratio Juris* 510.

<sup>111</sup> See FI Michelman, ‘Constitutional Legitimation for Political Acts’ (2003) 66 *Modern Law Review* 1, 9.

<sup>112</sup> Notably, although Lord Laws (*Thoburn v Sunderland City Council* [2003] QB 151 [60]-[67]) and Lord Neuberger and Lord Mance (*R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [207]) suggest the emergence of this conceptual distinction in the UK by acknowledging the existence of ‘constitutional statutes’ and setting them apart from other parliamentary legislation, they did not come to this conclusion in terms of the underlying politics of those constitutional statutes. See P Craig, ‘Constitutionalizing Constitutional Law: HS2’ (2014) *Public Law* 37. Nevertheless, it does not mean that a

mill politics and thus functions as the higher law. It should be noted that the practical implications of treating the constitution as the higher law turn on institutional design as well as legal tradition. Not all the jurisdictions that subscribe to the idea of higher law embrace a US-style judicial review.<sup>113</sup> Nor does the entrenchment of the constitution necessarily result in an inflexible constitutional order that will be out of sync with a changing society.<sup>114</sup> Even so, political constitutionalists resist the idea of the constitution as the higher law. Being a noted defender of political constitutionalism, for example, Bellamy takes no issue with HRA's content but maintains that 'there can be no higher, rights-based constitutional law that sits above or beyond politics'.<sup>115</sup> What intrigues me is Bellamy's characterization of a higher-law-style constitution as sitting above or beyond politics. Regardless of the different theories of higher law, I have noted above that the constitution as the higher law can be the result of politics. To be sure, it is not the same species of politics as Bellamy has in mind. Yet such a parliament-centred exclusionary view of politics is fundamental to him and other political constitutionalists. If another kind of politics can be imagined differently from that which

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dualist concept of democracy is off-limits to the UK. For an attempt to apply the dualist concept of democracy to the British constitutional context (Northern Ireland), see A Schwartz and C Harvey, 'Judicial Empowerment and Divided Societies: The Northern Ireland Bill of Rights Process in Comparative Perspective' in C Harvey and A Schwartz (eds), *Human Rights in Divided Societies* (Hart, Oxford, 2012) 123.

<sup>113</sup> See VF Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, New Haven, CT, 2009).

<sup>114</sup> Waldron acknowledges that 'a constitutional constraint is less unreasonable qua precommitment, the greater the opportunity for altering it by process of constitutional amendment'. Waldron (n 5) 275. But he continues to assert that 'such processes are usually made very difficult'. Ibid. This has not been borne out empirically, however. Take the German Basic Law for example. Since its inception in 1949, it has seen sixty-two amendments. See also D Grimm, 'The Basic Law at 60 — Identity and Change' (2010) 11 *German Law Journal* 33, 33. Among the most recent amendments of 13 July, 2017 is the amendment to article 21 of the Basic Law that provides for the financial countermeasure against antidemocratic parties. Tom Gerald Daly, 'Germany's Move to Deprive Anti-Democratic Parties of Federal Funding: An Effective Response to the Populist Wave?' *CONSTITUTIONNET*, 26 July 2017, <http://www.constitutionnet.org/news/germanys-move-deprive-anti-democratic-parties-federal-funding-effective-response-populist-wave> (last visited 14/10/2017).

<sup>115</sup> Bellamy (n 97) 90.

centres on the parliamentary process, there will be no reason to subject the constitution resulting from the former to the latter. Cutting loose from the political constitutionalist exclusionary view of politics, the contention that the parliament functions as the only political channel of democracy does not hold.

Now we can see why political constitutionalists can embrace HRA while rejecting rights-based constitutional law as higher law. They are pleased with the judicial scrutiny of government acts including the parliamentary legislation through the interpretation of the rights incorporated in HRA *as long as* its result remains subject to the parliament's final decision.<sup>116</sup> Corresponding to this stance, political constitutionalists insist that HRA's very existence too has to be subject to parliamentary politics as they conceive of no politics above or beyond the parliament.<sup>117</sup> Taken together, underlying political constitutionalism is the belief that all politics takes place around the parliament as the ultimate decision-making institution. Simply put, the parliament is sovereign.

The dissection of the British variety of political constitutionalism reveals that it amounts to an empirical justification of the doctrine of parliamentary sovereignty under the assumption that politics is confined to formal institutions and the decision of the parliament is the culmination of the political process.<sup>118</sup> This reflects what I have called the concept of institutional sovereignty.<sup>119</sup> Yet the assumption of institutional sovereignty also makes political constitutionalism as jurispathic as the court-centred, legal constitutionalism since the

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<sup>116</sup> See *ibid* 93, 98-102.

<sup>117</sup> See *ibid* 102, 110.

<sup>118</sup> Bellamy (n 6) 2. Cf Scott (n 107) 2169-70.

<sup>119</sup> See n 82 and the accompanying text.



parliament sits above the jurisgenerative process in which the extrastate sectors partake.

Nothing I have said suggests that the court should stand above the parliament as legal constitutionalism intimates. Otherwise, it would only be another manifestation of the concept of institutional sovereignty.<sup>120</sup> But it does invite us to rethink politics in a way that parliamentary sovereignty could be recast in a more robust non-court-centred political version of constitutionalism than political constitutionalists have entertained. Here comes in Cover's idea of constitutional jurisgenesis. Constitutional politics should be understood more broadly than political constitutionalism contends. It takes place where the meaning of the constitutional order is contested, debated, and rejuvenated beyond the Westminster. On this view, to make election the pivot of the connection between citizens and political decisions, what happens in the interval between elections should not be disparaged as anti-political. Rather, social movement and other forms of citizen mobilization are the lead-up to election. Only when the parliament continues to heed to the civil voices and narratives made in the media of essays, editorials, speeches, and other discursive forms and to answer the calls from citizens in making its decisions does it figure as 'the mirror of the nation'.<sup>121</sup> It is on this condition that parliamentary decisions deserve the respect from the court, or rather the people. Once the parliament fails the above condition, its decisions are jurispathic and citizens will thus find alternative channels, institutionalized or not, to make sure that their voices be heard, taking constitutional politics beyond the legislative chamber to the courtrooms and further to

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<sup>120</sup> See EF Delaney, 'Judiciary Rising: Constitutional Change in the United Kingdom' (2014) 108 *Northwestern University Law Review* 543, 575.

<sup>121</sup> M Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press, Oxford, 2013) 42.

the streets if necessary. Seen in this light, both the parliament and the court are part of the broader politics in the jurisgenerative process of constitutional rejuvenation. Neither the parliamentary legislation nor the court judgments are beyond the politics of norm contestation. It is in the contentious political process that the meaning of the constitution continues to evolve.

Viewing the prominence of the British parliament this way bears greatly on the doctrine of parliamentary sovereignty. Traditionally this constitutional doctrine suggests the British constitutional order as one of parliamentary government.<sup>122</sup> Yet, through the lens of constitutional jurisgenesis, we may see parliamentary sovereignty differently. As many British political constitutionalists have noted, the parliament has lived up to occasion time and again, pushing through many progressive but controversial reforms.<sup>123</sup> It is based on this record that the parliament has commanded deference from the court. Seen in this light, the parliament figures as ‘the mirror of the nation’ not because of its preordained constitutional status as a sovereign parliament. Instead, the parliament is admired only because of its ability to express ‘the mind of the [British] people’ and its role in forging national identity.<sup>124</sup> The parliament is not some awe-inspiring sovereign that is entitled to deference. It has to *win* respect. In sum, no institution can make a claim to sovereignty in a robust version of non-court-centred constitutionalism. In light of Cover’s idea of constitutional jurisgenesis, the focus of political constitutionalism should be on the politics of norm contestation, which

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<sup>122</sup> See *ibid* 43-50; J McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, Cambridge, 2012) 22-39.

<sup>123</sup> Bellamy (n 6) 253-54. Notably, the parliament failed many times in the balance of security and liberty. See *ibid* 249-52.

<sup>124</sup> Loughlin (n 121) 57.

involves not only institutions such as the parliament and the court but also the public.

## **2. After Judicial Sovereignty? Rethinking Judicial Self-Restraint in Light of Constitutional Jurisgenesis**

Unlike the British constitutional order centring on parliamentary sovereignty, the US constitution is defined by separation of powers. Through this comparatist lens, the core question of the relationship between law and politics in the US constitutional order is not whether the Court or congress is supreme but rather how to define their separate jurisdiction.<sup>125</sup> Since Chief Justice Marshall laid the foundation of modern judicial review in *Marbury v Madison* with the statement that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is’,<sup>126</sup> how to keep ‘acts [that] are only politically examinable’ outside the purview of judicial review has been at the heart of the distinction between law and politics.<sup>127</sup> Yet what is characteristic of the development of the US constitution in its two-century-long history has been its increasing judicialization.<sup>128</sup> The Court-mandated desegregation and its progressive jurisprudence on civil liberties and rights in the mid-twentieth century is the culmination of the long tradition of translating social issues into constitutional questions in the US.<sup>129</sup> With the constitution being treated more in line with law than with politics, judicial supremacy displaces separation of powers.<sup>130</sup> Constitutional

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<sup>125</sup> Bellamy (n 6) 201-07.

<sup>126</sup> 5 US (1 Cranch) 137, 137 (1803).

<sup>127</sup> Ibid 166.

<sup>128</sup> *Cooper v Aaron*, 358 US 1 (1958) illustrates this development. As a sequel to the great desegregation case, *Brown v Board of Education* (also known as *Brown I*, 347 US 483 (1954)), *Cooper* interpreted *Marbury v Madison* as ‘declar[ing] the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution’ and further inferred that ‘the interpretation of [the Constitution] enunciated by this Court...is the supreme law of the land’. *Cooper*, 358 US at 18. See also Kuo (n 82) 351-56.

<sup>129</sup> Graber (n 104).

<sup>130</sup> See S Snowiss, *Judicial Review and the Law of the Constitution* (Yale University Press, New Haven, CT, 1990) 195-222. See also A Somek, *The Cosmopolitan Constitution* (Oxford University Press, Oxford, 2014)

supremacy turns into judicial supremacy.

At its height the development of judicial supremacy also politicized the Court. Paralleling the political reactions to the Court's progressive jurisprudence was scholarly concerns over the judicial usurpation of the constitutional powers allocated to the political departments.<sup>131</sup> Judicial self-restraint first emerged as the rallying cry for checking the activist Court.<sup>132</sup> Notably, judicial self-restraint has since been a contested concept with different emphasis and implications.<sup>133</sup> The common theme for the diverse opinions rallied around this concept is a plea to the Court to invalidate legislation only when its unconstitutionality is 'so clear that it is not open to rational question'.<sup>134</sup> This is the famous Thayerian origin of judicial self-restraint in the US constitutional theory: The counter-majoritarian Court should show deference to the decisions taken by democratically elected legislatures in its exercise of judicial review. Leaving aside the theoretical subtleties in its evolution,<sup>135</sup> judicial self-restraint was then considered not only an antidote to judicial activism but also a policy of judicial self-preservation amid the political rancour aroused by the Court's progressive jurisprudence. As embodied in Alex Bickel's 'passive virtues', judicial self-restraint was advocated as part of judicial ethos that would be necessary to keep

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58-61.

<sup>131</sup> See LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, Oxford, 2004) 220-21.

<sup>132</sup> See A Cox, 'The Role of the Supreme Court: Judicial Activism or Self-Restraint?' 47 *Maryland Law Review* (1987) 118, 121-22.

<sup>133</sup> Compare RA Posner, 'The Rise and Fall of Judicial Self-Restraint' (2012) 100 *California Law Review* 519, 520-21 with D Luban, 'Justice Holmes and the Metaphysics of Judicial Restraint' (1994) 44 *Duke Law Journal* 449, 450-52.

<sup>134</sup> JB Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 144.

<sup>135</sup> See Posner (n 133) 522-31.

the judicial power away from political vicissitudes so that the Court could concentrate its limited political capital on matters of ‘principle’.<sup>136</sup>

It should be noted that among constitutional scholars the calls for judicial self-restraint have faded since its high in the 1980s, while the Court’s stance on judicial supremacy has firmed up even more.<sup>137</sup> Judge Posner has attributed the fall of judicial self-restraint to the thriving of constitutional theories. According to his observation, standing on a firm theoretical ground, judges have tended to approach constitutional issues from a comprehensive and systematic view. As a result, they have been less inclined towards exercising the policy-driven self-restraint and thus enhanced the role of the court in constitutional decisions.<sup>138</sup> Although the Court continues to interpret the constitution according to the ‘modalities of constitutional argument’,<sup>139</sup> its growing influence has made it the institutional embodiment of popular sovereignty.<sup>140</sup> Seen in this light, judicial supremacy is further transfigured into judicial sovereignty, if you will.<sup>141</sup>

Yet it may be premature to write the obituary of judicial self-restraint. On the one hand, it does not completely vanish from judicial practice as it has evolved from judges’ individual

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<sup>136</sup> See AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, New Haven, CT, 1962) 111-243; JH Chopper, *Judicial Review and the National Process: A Functional Reconsideration of the Role of the Supreme Court* (University of Chicago Press, Chicago, IL, 1980) 60-170.

<sup>137</sup> See Posner (n 133) 533-34. See also L Epstein and WM Landes, ‘Was There Ever Such a Thing as Judicial Self-Restraint?’ (2012) 100 *California Law Review* 557.

<sup>138</sup> See Posner (n 133) 535-50.

<sup>139</sup> See Bobbitt (n 19) 11-22.

<sup>140</sup> See PW Kahn, *The Reign of Law: Marbury v. Madison and the Constitution of America* (Yale University Press, New Haven, CT, 1997). See also PW Kahn and K Brennan-Marquez, ‘Statutes and Democratic Self-Authorship’ (2014) 56 *William and Mary Law Review* 115.

<sup>141</sup> See Kuo (n 82) 368-74.

virtue into the Court's institutional strategy in specific types of litigation.<sup>142</sup> On the other, in the guise of 'minimalism', the ethos of judicial self-restraint continues to function as a counterforce to judicial activism.<sup>143</sup> Moreover, a quick check on the recent highly contentious cases discloses that advocates of different political persuasions have made pleas for judicial self-restraint when the odds are against their position on substantive constitutional issues.<sup>144</sup> Thus, the appeal of judicial self-restraint endures, despite the prevalence of judicial supremacy.

I take no position on the theoretical subtleties of judicial self-restraint. What interests me here is the underlying concern of judicial self-restraint: As the trend of judicialization deepens, the Court may pre-empt democratic changes by entrenching certain policy choices through its decisions.<sup>145</sup> To put it differently, once the Court speaks, what it says will stay as part of the constitution, commanding consent and observance from the political departments and the public. This is what the concept of judicial self-restraint presupposes and aims to roll back when it is invoked to avert the ossification of the constitutional order in the era of judicial supremacy. Yet the presupposition that the political departments and the public will observe what the Court says is the mirror image of judicial sovereignty: The Court is the institutional

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<sup>142</sup> See PS Karlan, 'The Transformation of Judicial Self-Restraint' (2012) 100 *California Law Review* 607.

<sup>143</sup> See Sunstein (n 73) 4-5; T Smith, 'Reckless Caution: The Perils of Judicial Minimalism' (2010) 5 *New York University Journal of Law and Liberty* 347. But cf Posner (n 133) 521.

<sup>144</sup> E.g., 'Supplemental Brief of Amici Curiae Representatives Chris van Hollen, David Price, Michael Castle, and John Lewis in Support of Appellee' in *Citizens United v FEC*, 558 US 310 (2010) (calling for the Court to uphold federal legislation on campaign finance on the basis of judicial restraint, inter alia); 'Brief of Thirty-Seven Scholars of Federalism and Judicial Restraint as Amici Curiae in Support of Petitioners' in *Hollingsworth v Perry*, 570 US \_\_\_\_; 133 S Ct 2652 (2013) (urging the Court not to grant certiorari to let the decision upholding California's constitutional ban on same-sex marriage stand).

<sup>145</sup> See Sunstein (n 73) 28-32.

embodiment of popular sovereignty as the constitution becomes what the Court says it is.<sup>146</sup>

Viewed thus, judicial self-restraint does not so much challenge judicial supremacy as implicitly endorses the idea of judicial sovereignty. To begin with, it fails to give a coherent account of the appropriate scope of judicial review apart from appealing to the prudential judgment of individual judges or turning to the ambiguous idea of judicial minimalism.<sup>147</sup> Notably, given the constitution being treated as law vis-à-vis politics, its implementation is measured against ‘how the constitution would be expounded by *judges*’.<sup>148</sup> Thus, in the eyes of the public, invoking the incoherent judicial self-restraint is tantamount to failing the judicial duty to enforce the Constitution. This explains why judicial self-restraint has gradually gone out of fashion.<sup>149</sup> More important, focusing on whether the Court should intervene and how deep or broad its intervention should be, judicial self-restraint pictures a curtailed image of constitutional law and politics.<sup>150</sup> On this view, the interaction of law and politics only exists before the Court decides. Once the decision is taken, the law speaks and all politics ends. This view of constitutional law only consolidates the role of the Court as the institutional holder of sovereignty. In other words, both judicial self-restraint and judicial supremacy are premised on the concept of institutional sovereignty, converging on a court-centred view of constitutional law.<sup>151</sup> The constitution is equated with judicial decisions whose depth and breadth are a function of judicial ethos. The legal profession becomes the agent of the

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<sup>146</sup> See C Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Harvard University Press, Cambridge, MA, 2004).

<sup>147</sup> See Posner (n 133) 535-38; Smith (n 143).

<sup>148</sup> Somek (n 130) 60 (emphasis added).

<sup>149</sup> See Posner (n 133) 533-50.

<sup>150</sup> RC Post and RB Siegel, ‘Roe Rage: Democratic Constitutionalism and Backlash’ (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373, 378-87.

<sup>151</sup> See *ibid* 390.

constitution by virtue of expertise (legal argument) and ethos (self-restraint or activism). Under this view, there is no place for constitutional politics outside the court. In the final analysis, advocates of judicial self-restraint and their progeny are concerned with how to keep politics away from the Court.<sup>152</sup> What emanates from this Court-centred view of constitutional law is constitutional jurispathy, inadvertently strengthening the Court's position in the constitutional order and lending added legitimacy to its decisions.

Upon closer inspection, however, the above image of judicial review as envisaged by those in support of judicial self-restraint is a distorted view of the role of the Court in resolving constitutional issues. As many studies have shown, what the Court says does not end the debate over constitutional issues.<sup>153</sup> Instead, judicial decisions are only a part of broad constitutional politics. Sitting atop the judicial system, the Court may give a formal sense of finality to a legal controversy by its decision.<sup>154</sup> But its opinion never evokes the majesty of a sovereign voice. Once it announces its decision, it also subjects itself and its opinion to further public scrutiny. Constitutional law and politics relate to each other not only before but also after the Court decides. It is through this process that the constitution evolves. Desegregation, the continuing contention over abortion, and the equal protection of gay people, to name just a few, are examples of how significant constitutional issues have played out in the interaction among the public, the political departments, the Court, and even the states.<sup>155</sup>

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<sup>152</sup> Cf *ibid* 391-406.

<sup>153</sup> See *ibid*; M Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press, Oxford, 2004); WN Eskridge, Jr, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States' (2013) 93 *Boston University Law Review* 275.

<sup>154</sup> See Kramer (n 131) 234-42.

<sup>155</sup> See CR Massey, 'The Locus of Sovereignty: Judicial Review, Legislative Supremacy and Federalism in the Constitutional Traditions of Canada and the United States' (1990) *Duke Law Journal* 1229, 1273-75.



Sometimes the Court responds to and codifies the result of social movement by its decision;<sup>156</sup> at other times its decision prompts citizen resistance and adds fuel to further mobilization.<sup>157</sup> Seen in this light, the Court is not supreme or sovereign. Situated in constitutional jurisgenesis, the myth of judicial sovereignty dissipates.

As part of constitutional jurisgenesis, there is no reason why the Court should be restrained from exercising its assigned power as it is never supreme. Nor need it restrain itself for fear of politicization as a self-restrained Court can also be seen as a product of constitutional politics. Rather, the Court should live up to what is expected of it: contributing to the building of a constitutional *nomos* through its interpretation of the constitution. But at the same time the Court should not expect to give a definitive meaning to the constitution by settling a constitutional issue once and for all. It has no control of its own decisions, the meaning of which will only materialize in the jurisgenerative process of constitutional politics.<sup>158</sup> As Ackerman's reconstruction of the civil rights revolution in the US shows,<sup>159</sup> neither the historical statutes such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 nor the Court's serial landmark decisions have defined the civil rights revolution. Rather, it is constitutional politics in which those legislative and judicial decisions were situated that has given new meaning to the constitution by dismantling the Jim Crow system in American

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<sup>156</sup> *Obergefell v Hodges*, 576 US \_\_\_\_ (2015), which invalidates marriage discrimination based on sexual orientation, is the most recent example. See also Eskridge (n 153).

<sup>157</sup> *Roe v Wade*, 410 US 113 (1973) legalized abortion but reaction to it continues. See also Post and Siegel (n 150) 406-24. In contrast, the Court declared school segregation unconstitutional in *Brown I* but its implementation was carried out amid political reaction and civil rights movement. See also Klarman (n 153) 344-442.

<sup>158</sup> See Post and Siegel (n 150) 382-85.

<sup>159</sup> See Ackerman (n 110).

South.<sup>160</sup> In a nutshell, both judicial self-restraint and judicial activism should be understood as part of this jurisgenerative process and assessed within it.

### ***B. Lesson Two: Substantiate the Fiction of Popular Sovereignty with Constitutional Narratives***

I have pointed out why the concept of sovereignty contributes to the jurispathy of constitutional orders when sovereignty is identified with a single institution under a constitutional order, whether it is a separation of powers system like the US or a British-style parliamentary government. Yet, despite being regarded as fictitious,<sup>161</sup> the idea of popular sovereignty is central to all democratic governments—or so argues Waldron.<sup>162</sup> How to realize this idea in a constitutional order has thus been the focus of constitutional scholarship. Some scholars associate it with a particular institutionalized constitutional power. Dicey's doctrine of parliamentary sovereignty is the prime example of the institutionalist approach.<sup>163</sup> Besides, in constitutional orders with strong-form judicial review, institutionalists debate whether the court or the parliament is the better agent of popular sovereignty.<sup>164</sup> Other

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<sup>160</sup> See *ibid.*

<sup>161</sup> See ES Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (WW Norton and Company, New York, NY, 1988)

<sup>162</sup> See Waldron (n 5) 255-57. For its relevance to parliamentary sovereignty, see M Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2007) 27, 33-38.

<sup>163</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (6<sup>th</sup> edn, Macmillan and Co, London, 1902) 37-82.

<sup>164</sup> Those who suggest that the court reflects popular sovereignty better than the political branches include Ronald Dworkin and Frank Michelman. Cass Sunstein is the representative of those who emphasize the legislative role in the realization of popular sovereignty. Paul Kahn contends that the search for the institutional embodiment of the transtemporal popular sovereignty sets new trends in the post-1980s US constitutional theory, which has centred on the concept of community as the linchpin of constitutional interpretation. See PW Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (Yale University Press, New Haven, CT, 1992) 179-89, 200-09. Notably, the institutionalist approach to the constitutional question of popular sovereignty is not confined to the US. The intensifying intervention of the German Federal Constitutional Court in the matters of consolidating the European Union has raised the question

scholars look to the constitutional structure itself instead of attributing popular sovereignty to a single constitutional power. Ackerman is the representative structuralist. In his view, the separation of powers of the US constitution itself is the constitutional design to identify when the people speaks.<sup>165</sup> Still others focus attention on procedure. Whether they appeal to ‘democratic constitutionalism’<sup>166</sup> or argue for ‘proceduralist democracy’,<sup>167</sup> the common theme for proceduralists is that popular sovereignty translates into the procedures of democratic decisionmaking.

What unifies the various theories of popular sovereignty, including those centring on deliberative democracy and its corresponding version of jurisgenerative politics, is their formal approach, the focus of which is on how popular sovereignty comes into existence through a ‘constitutional form’.<sup>168</sup> Under this approach, the question of popular sovereignty is resolved into one of constitutional design: How can we make government decisions responsive to the citizenry through institution, structure, procedure or a combination of them all? This is inevitably important to constitutional democracy. Yet it leaves the principal of popular sovereignty out: Who are the people? Focusing on the agent, whether it is understood in institutional, structural, or procedural terms, without identifying the principal, the formal approach fails to inspire a sense of authorship and only solidifies the fictitiousness of popular

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of whether it has elevated itself to the position of judicial sovereignty in the place of ‘We the People’. JEK Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford University Press, Oxford, 2013) 93, 175, 207. See also WT Eijssbouts, ‘Wir Sind Das Volk: Notes About the Notion of ‘The People’ as Occasioned by the Lisbon-Urteil’ (2010) 6 *European Constitutional Law Review* 199.

<sup>165</sup> See B Ackerman, ‘Neo-Federalism?’ in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press, Cambridge, 1988) 153, 166-74.

<sup>166</sup> See Post and Siegel (n 150).

<sup>167</sup> See Habermas (n 8) 463-90.

<sup>168</sup> See Loughlin and Walker (eds) (n 162).

sovereignty.<sup>169</sup> To be clear, I am not alluding to any preconstitutional *ethnos*. Rather, my emphasis is on the substantiation of the fiction of popular sovereignty through constitutional discourse.<sup>170</sup>

Notably, Michel Rosenfeld suggests that constitutional discourse helps to articulate constitutional identity through the deployment of constructive tools such as negation, metaphor, and metonymy.<sup>171</sup> Yet, through narratives about the constitution, which speak to the unfolding of the constitutional project and its purpose with emphasis on the agent and the chronological order of her acts under it,<sup>172</sup> constitutional discourse can help with the articulation of popular sovereignty in another way. I have noted that Cover suggested that the court could become less jurispathic by committing itself to the ongoing project of *nomos*-building with its substantive reasoning. Through its opinion in which the people can identify themselves, the court reveals a constitutional *nomos* to the people. In Rogers Smith's term, judicial opinions speak the voice of popular sovereignty when they tell the 'stories of peoplehood'.<sup>173</sup> In a nutshell, popular sovereignty is substantiated in the corpus of constitutional discourse (including nonjudicial government decisions or rulings) when it reads more like narratives, accounts, or stories of the people themselves than an essay of political

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<sup>169</sup> See Kahn and Brennan-Marquez (n 140) 173-77.

<sup>170</sup> 'The [c]onstitution is a linguistic system...a discourse'. Levinson (n 87) 191. For a different and doctrinal understanding of constitutional discourse, see A Jakab, *European Constitutional Language* (Cambridge University Press, Cambridge, 2016) 62-69.

<sup>171</sup> See M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, London, 2010) 45-65.

<sup>172</sup> See G Olson, 'Narration and Narrative in Legal Discourse' in P Hühn et al (eds), *Handbook of Narratology: Volume 1* (2<sup>nd</sup> edn, De Gruyter, Berlin, 2014) 371.

<sup>173</sup> See RM Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge University Press, Cambridge, 2003).

philosophy or a commentary on legal doctrines.<sup>174</sup>

Granted, there is nothing new in the proposition that the government agencies, especially the court, shape the people's identity through their decisions.<sup>175</sup> It has also been well-argued that the legitimacy of the constitutional government depends on the reasoning and argument in support of its decisions.<sup>176</sup> Yet the traditional focus has been on the 'scientific' character of reasoning and rational argument in constitutional discourse.<sup>177</sup> What matters is that reasoning and argument must withstand the scrutiny of logical analysis and moral science. Take judicial opinions for example. Through the scientific lens, judicial opinions are treated like applied political theory,<sup>178</sup> while the court is compared to a postgraduate seminar.<sup>179</sup> This emphasis on the scientific aspect of constitutional discourse is further strengthened when it is viewed from a professional perspective.<sup>180</sup> With respect to the relationship between the court and the public, judicial opinions are appreciated more in terms of the approval from the peer group of legal professionals (judges in particular) than for their giving voice to the people.<sup>181</sup> Viewed thus, constitutional discourse reads like a citizenship guidebook of moral principles or a treatise on morality to be learnt by the people. Failing to tell the people's stories, however, neither a

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<sup>174</sup> See *ibid* 44-49. Cf Harris (n 9) 84-113. For an illuminating discussion of the construction of German identity through constitutional discourse, see *v Arnould* (n 77) 312-20.

<sup>175</sup> E.g., F Bechhofer and D McCrone (eds), *National Identity, Nationalism and Constitutional Change* (Palgrave Macmillan, London, 2009).

<sup>176</sup> See M Cohen, 'When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach' (2015) 72 *Washington and Lee Law Review* 483, 496-513.

<sup>177</sup> Cf Habermas (n 8) 111.

<sup>178</sup> See D Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press, Princeton, NJ, 2010) 1.

<sup>179</sup> See Bickel (n 136) 68-71.

<sup>180</sup> See Kahn (n 164) 190-96.

<sup>181</sup> See Kramer (n 131) 162-64; Post and Siegel (n 150) 427; Robertson (n 178) 382; J Waldron, 'Partly Laws Common to All Mankind': *Foreign Law in American Courts* (Yale University Press, New Haven, CT, 2012) 100-08, 220-23.

citizenship guidebook nor a philosophical treatise comes close to the constitutional discourse in which the people can identify themselves.

To make itself the expression of popular sovereignty, constitutional discourse needs not only to analytically articulate the moral principles the people hold dear but also to account for where those moral principles come from, how they are to be carried out in the present practice, and moreover, how they constitute and define the people.<sup>182</sup> Judicial opinions, for example, need to absorb and contest but more important, enter into dialogue with the competing narratives and stories the people themselves tell of the moral principles. In this way, narratives are not the opposite of rational argument and analytical reasoning. Rather, both elements of constitutional discourse are essential to persuade the people to find themselves in the constitutional project. By virtue of narratives, what emerges from judicial opinions and other constitutional discourse evokes a constitutional *nomos* in which the people can find the moral principles meaningful. The people come into existence in constitutional discourse through the stories and narratives with which they can identify. Aimed at *nomos*-building, the making of constitutional discourse should be treated as ‘a more ‘humanistic’ than ‘scientific’ enterprise’.<sup>183</sup>

With the above shift of orientation, an even broader concept of constitutional politics comes into sight. Judicial opinions will no longer be the monopoly of the legal profession. Instead, judges will have to think about how to position themselves towards the people’s competing stories and how to incorporate those stories in their opinions in telling the official

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<sup>182</sup> Cf Smith (n 173) 135-54.

<sup>183</sup> Ibid 44.

story. They will not only need to attend to the statements made by the opposing parties and their legal counsels but also to be open to the inputs from the general public, whether they are delivered in the form of an *amicus curiae* opinion or not.<sup>184</sup> Looked at through this lens, judicial opinions will shape up as if they are a result of collective drafting. They will not only be subject to the peer review of professional and academic lawyers but also to the public scrutiny of the people. Moreover, with the addition of constitutional narratives of peoplehood, constitutional discourse can turn into a medium of constitutional politics.<sup>185</sup>

There are some issues yet to be clarified. Take the judicial opinion again. Like other types of constitutional discourse, the purpose of the judicial opinion is to persuade the citizen-readers to accept its ruling. It works towards this purpose in large part by virtue of rationalist argument and forensic reasoning. Yet, as a ‘persuasive speech’, some scholars have suggested that to strengthen its persuasive force, the judicial opinion be styled as if it is a kind of storytelling or rhetoric.<sup>186</sup> It may or may not be the case, but that is not what I have argued for the role of narratives in constitutional discourse. My focus is on the substance of judicial opinions, not their style. Another related issue is the ambiguities concerning the role of narratives in the judicial opinion itself. Although narratives are instrumental in persuasion, storytelling has long been suspected of subverting the business of governance for its falsity,

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<sup>184</sup> See DL Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford University Press, Oxford, 2008) 49.

<sup>185</sup> See P Brooks, ‘The Law as Narrative and Rhetoric’ in P Brooks and P Gewirtz (eds), *Law’s Stories: Narrative and Rhetoric in Law* (Yale University Press, New Haven, CT, 1996) 14, 16.

<sup>186</sup> See JM Balkin, ‘A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason’ in Brooks and Gewirtz (eds) (n 183) 211; LH LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (Pennsylvania State University Press, University Park, PA, 1995) 2-3, 11. Cf PW Kahn, *Making the Case: The Art of the Judicial Opinion* (Yale University Press, New Haven, CT, 2016) 18-45.

irrationality, and seductiveness.<sup>187</sup> Yet storytelling is not inherently inimical to governance. As Kenji Yoshino perceptively observes, it can be defended on the grounds of ‘virtue’, which even Plato did not repudiate outright.<sup>188</sup> Narratives are defensible for their integrative role in bringing the judicial opinion closer to the people.<sup>189</sup> To be sure, narratives do not necessarily make a judgement better, but they *could* render a judicial opinion more reflective of popular sovereignty.<sup>190</sup>

It would take a real case and an entire ruling to illustrate how a judicial opinion could speak the voice of popular sovereignty with narratives. Instead, I shall only point out how narratives can be brought into the judicial opinion as part of my attempt to reorient the legal vs political constitutionalism debate towards constitutional jurisgenesis. From the perspective of narratives, the identity of the storyteller in a judicial opinion is pivotal to the persuasiveness of her narrative and to the constitutional *nomos* it projects.<sup>191</sup> Thus, the account the court gives of its role in the constitutional order should be carefully considered. It should not be taken for granted or treated as a matter of legal technicalities. Instead, the historical evolution of which the court has been part and in relation to which its jurisprudence currently stands should be addressed. Notably, the judicial-self-account has existed as the lawyerly summary of the case law in judicial opinions. Nevertheless, it does not have to be presented that way. Rather, it can be laid out in historical narratives. In this way, the court

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<sup>187</sup> See K Yoshino, ‘The City and the Poet’ (2005) 114 *Yale Law Journal* 1835, 1836-37, 1841-59.

<sup>188</sup> See *ibid* 1858-68.

<sup>189</sup> See *ibid* 1864. It is also noteworthy that narrative here is more than storytelling. Rather, constitutional narratives are structured and constrained by what Frederick Schauer calls ‘the uniqueness of constitutional language’, especially its ‘presuppositional nature’. See F Schauer, ‘An Essay on Constitutional Language’ (1982) 29 *UCLA Law Review* 797, 803-04. Cf v Arnauld (n 77) 317.

<sup>190</sup> Cf M Minow, ‘Stories in Law’ in Brooks and Gewirtz (eds) (n 185) 24, 30.

<sup>191</sup> See LaRue (n 186) 21.



situates itself in the collective story and memory of the people. Its identity changes from the oracle of what the law is into a genuine participant in the discursive community.<sup>192</sup> In addition to the self-conscious re-presentation of its identity through narratives, the court can benefit from narratives when it gives account of fact. It may not be easy to differentiate fact from law in a constitutional case. But it is inescapable for the court to give account of legal/constitutional fact in its judgment.<sup>193</sup> It is true that fact should be based on empirical evidence. Yet empirical evidence plays a less important role than it seems, say, in the ‘viability’ of a foetus in abortion cases in the US law<sup>194</sup> as that issue concerns the so-called ‘reviewable fact’ rather than ‘case-specific fact’.<sup>195</sup> In this regard, the court may give more voice to narrative evidence or other accounts of experience presented by the ‘friends of the court’ in its account of fact in judicial opinions.<sup>196</sup> These two examples suggest the direction in which narratives can make judicial opinions more inclusive and help to substantiate popular sovereignty in constitutional discourse.

## IV. CONCLUSION

The political vs legal constitutionalism debate has broad implications to the global development of constitutionalism beyond the British constitutional context. On the one hand, with the continuing spread of constitutionalism, the concept of global constitutionalism emerges but its meaning remains contentious. At the core of the debate surrounding global constitutionalism is the institutional arrangement of the global constitutional order where law

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<sup>192</sup> See Kahn (n 164) 171-72.

<sup>193</sup> See Faigman (n 184) 1; LaRue (n 186) 9-10.

<sup>194</sup> *But* see Faigman (n 184) 3-13.

<sup>195</sup> See *ibid* 46-48, 51-56.

<sup>196</sup> Compare Faigman (n 184) 49, with LaRue (n 186) 125-27. See also *v* Arnould (n 77) 324-25.

and politics intersect.<sup>197</sup> The long and winding saga of *Kadi* shows that the new global constitutional landscape cannot escape from the political vs legal constitutionalism debate as to the role of the court in the constitutional order.<sup>198</sup> On the other hand, as human rights and other cosmopolitan values associated with global constitutionalism continue to penetrate domestic legal orders, it is noted that political constitutionalism has seen a revival.<sup>199</sup> Against this broad backdrop the seemingly repetitious and very British debate surrounding political and legal constitutionalism deserves a fresh look, which I hope to give in this paper.

As I have noted, the political vs legal constitutionalism debate has centred on whether and to what extent judicial review is beneficial to constitutionalism. For political constitutionalists, constitutionalism thrives by keeping the court from interfering with the political process. In this paper, I questioned this variety of political constitutionalism in light of Cover's idea of constitutional *nomos*. Drawing upon his deep understanding of the meaning of constitutional orders, I argued that the relationship between law and politics as envisaged by political constitutionalists is premised on a narrow understanding of constitutional politics, which fails to grasp the broad political process that includes both the parliament and the court. To move towards an alternative non-court-centred version of political constitutionalism, constitutional theory should reconsider the role of institutional sovereignty in rethinking the relationship between law and politics in constitutional orders.

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<sup>197</sup> See CEJ Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 611, 615-25, 629.

<sup>198</sup> See D Hovell, 'Due Process in the United Nations' (2016) 110 *American Journal of International Law* 1, 8-29.

<sup>199</sup> Somek (n 130) 196-201.

I agree with political constitutionalists that to realize the meaning of constitutionalism, we need to look beyond judicial review. Yet I disagree with their institutionalist view that reduces the complex dynamic of law and politics in a constitutional order to the operation of the parliament. Learning from Cover, political constitutionalists should shift focus from the institutional relationship between the court and the legislature to the way that they can contribute to the broader politics of constitutional jurisgenesis. The first step towards constitutional jurisgenesis is to reconsider the idea of institutional sovereignty. The received doctrine or principle of institutional sovereignty in the guise of parliamentary sovereignty or judicial supremacy is a function of the legislative or the judicial power giving voice to the constitutional visions that are forming among citizens.

Furthermore, moving to this new understanding of constitutional politics, we can also rethink how constitutional democracy acts out the idea of popular sovereignty through constitutional discourse. Notably, Cover's idea of jurisgenerative constitutional politics as I present in this paper is distinct from the Habermasian proceduralist version. Through the lens of Cover's constitutional jurisgenesis, the meaning of the constitution does not end where scientific, rational argument stops. Rather, it is constantly enriched through a variety of narratives flowing in the political community. As the meaning of the constitution is what we should be concerned about, we need to extend the reach of constitutional discussion to those not so scientific but meaning-enriching constitutional narratives. Confronting constitutional scholars with his existential critique of political order, the self-claimed anarchist Cover broadens the boundary of constitutionalism and enriches our understanding of constitutional

politics.<sup>200</sup> Constitutional jurisgenesis is not only about procedure. Rather, substantive values and justice are what matters in jurisgenerative constitutional politics.<sup>201</sup> For this robust version of political constitutionalism we can learn a lot from Cover even thirty years after his untimely death.

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<sup>200</sup> Soifer (n 29) 75-76. *But* see Post (n 8) 10.

<sup>201</sup> Soifer (n 29) 79-80.